EWR, Inc.

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September 21, 2001

Mr. Roger Hinkle, Chief
Licensing Authority Branch
Warehouse and Inventory Division
Farm Service Agency
U. S. Department of Agriculture
STOP 0553
1400 Independence Avenue, SW
Washington, DC 20250-0553

Dear Mr. Hinkle:

Thank you for the opportunity to share with USDA my comments regarding the proposed U.S. Warehouse Act rules which were published on September 4, 2001. I will try to divide EWR Inc.'s comments into groups. As a Provider of electronic receipts, EWR Inc. has a direct interest in these proposed rules. The page numbers I refer to are those which appear in the Federal Register.

Part 735 - Regulations for the U.S. Warehouse Act

p. 46313 - In the definition of "Central Filing System," it would be helpful to know what the words "transparent" and "anonymous" mean in this context. It is very unclear to me.

p. 46313 - In the definition for "Other electronic document" the word "shipment" is used. It should be noted that Providers have been including electronic shipping orders on their systems for many years. It is not appropriate for USDA to begin regulating shipping orders especially since these are non-title documents. Please refer to my comments about 735.400(a).

The current definition of "Other electronic document" is too broad and, therefore, is not meaningful or useful. This definition could easily be interpreted so broadly so as to include invoices, letters of credit, shipping orders, and truck bills of lading, among other things. EWR Inc. recognizes that the USDA staff would prefer not to specify each document in the regulations and we do not recommend that approach. It might improve this definition to include language stating that "other electronic documents" are title documents:

"...means those electronic title documents..."

Even the preceding language may not be adequately specific but it is an improvement. This wording does require an "other electronic document" to be some form of title. By narrowing the list to include only title documents (e.g., letter of credit is one but a shipping order is not), this helps to differentiate "other electronic document" from "USWA electronic document."

p. 46313 - In 735.401 reference is made to "USWA electronic document." This term is not defined and it is difficult to differentiate it from the two formally defined terms "electronic document" and "other electronic

W-3

document." Clarification is needed simply to have some idea what this is. Here is a suggested definition which requires USDA to specifically declare a document to be an "USWA electronic document:"

USWA Electronic Document means those electronic documents, other than an EWR or an 'other electronic document,' which are related to agricultural products and which DACO has specifically declared to be such a document.

p. 46314, 735.9 - The provision allowing for arbitration is good and should remain as written.

p. 46316, 735.110(d) - No time period (i.e., "...upon the delivery...") is specified in which the warehouse must cancel a receipt. Even nebulous words such as "in a timely manner" are not included. EWR Inc. currently experiences problems because a warehouse cannot issue a receipt for a bale until the prior warehouse deletes its receipt which represents that same bale (EWR Inc. checks the gin code & tag and will not allow duplicates to exist on the system). Some reasonable time frame (e.g., within seven calendar days of shipment) needs to be included. Also, please review the comments below regarding 735.300(b)(6).

p. 46317, 735.300(b)(5) - The words "...purposely omits information for which a ... field is provided" and "...notate the blank to show such intent" are not appropriate. Providers provide numerous optional fields so that the warehouse can include additional, non-required information if it chooses. The current language would mandate that the warehouse make some entry into all of these optional fields. This will be extra, unnecessary data entry work for the warehouse. This provision will require current warehouse and Provider software to be reprogrammed.

The intent of this statement appears to be to require warehouses to input data into all of the required receipt fields. It should be stated in that manner instead of the way it is stated now. Suggested replacement language would be:

(5) must input data into all receipt fields required by the Department.

p. 46317, 735.300(b)(6) - Remember 735.110(d) mentioned above? That section states that a warehouse must cancel a receipt upon delivery of the product. This section (735.300b6) seems to conflict with the other one. This section states that the warehouse cannot deliver the product until the receipt is canceled. It does not appear to be possible for the warehouse to comply with both sections as the language is currently written. Note that the applicable section in the new Warehouse Act appears to be Section 12d (7 USC 251).

p. 46317, 735.302(a) - While the new Warehouse Act and the proposed regulations imply in numerous places that each warehouse can only have one Provider at a time, I cannot find language in the regulations stating this. (An example of "implied" is seen in 735.302a2 which uses the singular form of the word "provider.") This needs to be specifically stated. Whereas this "one warehouse-one provider" doctrine is used currently as common business practice in the cotton industry, many new commodities will soon have electronic receipts. It cannot be assumed that these newcomers will understand or follow an unstated doctrine of common industry practice in cotton. EWR Inc. is not aware of any group at present which is advocating allowing warehouses to have multiple providers for a single commodity.

The problem, of course, with a warehouse having multiple Providers is that the integrity of the receipt cannot be assured. Consciously or inadvertently the warehouse could issue a receipt for the same product on more than one Provider system. At EWR we have observed *many* instances (as recent as last week) in which a warehouse has tried (inadvertently) to issue the same receipt(s) on our system twice (or more). This simply is

not worth the risk of duplication. In addition, I would assume that multiple providers at a single warehouse would make it much more difficult (and expensive) for USDA (FSA or CCC) to audit a warehouse.

Multiple providers would cause the warehouse additional work and expense since the warehouse will have to keep more than one set of electronic records in balance and since the workers will have to become familiar with the operation of more than one system. Merchants will face new problems (and more work) trying to keep track of which receipt belongs to which provider at a single warehouse.

Restricting a warehouse to a single provider has not caused any undue hardship or burden on warehouses, gins, merchants, or producers in the cotton industry since the initiation of EWR's in cotton. EWR Inc. is not aware of any complaints about this current practice.

The new Warehouse Act in Section 11 (7 USC 250) states that two (or more) receipts may not be issued for the same agricultural product. The only practical way to achieve this when dealing with electronic receipts is to restrict each warehouse to having only one electronic receipt Provider (for each commodity) at any one time.

EWR Inc. suggests that a minor change be made to the language in **735.302(a)(1)**:

Only issue ewr's through one FSA-approved provider for each agricultural commodity.

The preceding language would allow a warehouse which stores multiple commodities to have a different Provider for each commodity. However, the wording would allow the warehouse to have only one Provider per commodity.

p. 46317, 735.302(a)(6) - It is not common practice currently for the warehouse to give written notice to the Provider when the warehouse wants to modify data on a receipt it issued and holds. Requiring written notice will slow down the correction process (n.b., warehouses typically only modify a receipt in order to correct it), create additional work for the warehouse, create additional filing for the Provider, and add to general chaos. There is nothing to be gained by doing this. This language should be stricken.

p. 46317, 735.302(b)(3) - The words "must be included" certainly sound like the word "required" to me. Why not just call Holder a required field which everyone knows it is (are we trying to fool someone by calling it 'additional information?').

p. 46318, 735.302(b)(7) - In current business practice, the Provider is <u>often</u> authorized by the user to take action on behalf of the user. This might occur, for example, if a user's computer breaks. In any case, the users must be permitted to *continue* doing what they do now, which is to authorize the Provider to act as their agent on their behalf. The language in the proposed regulation does not forbid this but it also does not state that such action is okay. Does omission of this topic imply that it is okay to continue this current, common business practice? If omission implies that the practice is okay then no new wording needs to be added. If omission implies that the current practice is not okay, then the regulatory wording should be changed as follows:

"...authorize any other user of a provider, <u>or the provider itself</u> to act on their behalf..."

p. 46318, 735.400(a) - As was mentioned in earlier comments about the proposed definitions on page 46313 of the regs, currently Providers have electronic shipping orders on their systems. The language here appears

to indicate that USDA will now regulate this non-title document. USDA does not need to regulate non-title documents. The language here probably needs to be changed to add the words:

(A) Electronic title documents specified by the Secretary relating to the shipment, payment...

This suggested wording would give the Department flexibility in deciding which specific documents should be "other electronic documents" and which should not. Please refer to my comments regarding the definitions on page 46313.

p. 46318, 735.401(a)(2) - With respect to the new insurance requirements, EWR strongly recommends that these requirements become effective with the start of the next crop year since most Providers, including EWR, already have obtained insurance for the current season which the cotton industry is now well in to. Providers likely did not budget for the higher insurance costs this season and they should be given until next season to make arrangements for the higher limits.

p. 46318, 735.401(b)(5) - USDA obviously feels it is important to let it be known that Providers will act in an impartial manner toward all users because the Department not only makes reference to "conflict of interest" at this point, it also makes reference to a separate "provider integrity statement" in 735.401(b)(8). EWR Inc. agrees that it is helpful to include language which declares to everyone that the Provider will act fairly and with no bias.

That language required by 735.401(b)(5) was *not* included in the proposed Provider Agreement (Exhibit C), although applicable language *does* seem to be in Exhibit F. In any case, the appropriate language would be best included in the regulations where users of Provider systems will have the opportunity to read the words requiring the independence of Provider systems. Inclusion in the regulations would automatically make the language part of the "terms" section of each Provider Agreement (Exhibits C & F).

Basically the language should simply say that a Provider will operate in an honest, impartial, and fair manner. EWR Inc. has no problem with such a statement and we would be surprised if someone suggested that a Provider should *not* operate in an honest, impartial, and fair manner.

Leave the proposed language in 735.401(b)(5) as it is (and add the required conflict of interest wording to the Provider Agreement). In addition, add a new section, 735.401(e). Suggested language for this new section would state:

Each Provider will operate a system that is independent in action and appearance of bias or influences other than those which serve the best interests of the users.

The preceding language was written by USDA staff and is taken directly from the preamble of the Provider Agreement (Exhibit C). The language used, "independent in action and appearance" is similar to the language that defines the relationships between CPA's and their audit clients. By placing the language in the regulations, both the Providers and users will be aware of the exact requirements. It also would seem to be needed as a new section 735.402(f) in order to be included in Other Electronic Documents Provider Agreement (Exhibit F). Please refer to my comments regarding the Provider Agreement (Exhibit C) as to what suggested new language of this type should be added to that document.

p. 46318, 735.401(b)(8) - The proposed Provider Agreement (Exhibit C) does not include any "integrity statement." The intent of the writers of these proposed rules clearly is to include wording that will assure

readers that Providers will be independent and exhibit the highest integrity. EWR Inc. supports this. All that is needed is actual language in both the regulations and the Provider Agreement(s). The language should require the Provider to be independent of any real or potential conflicts of interest. Please refer to my comments regarding 735.401(b)(5) and my comments regarding the Provider Agreement (Exhibit C).

p. 46318, 735.402(a)(1) & (2) - This states that Providers of "other electronic documents" (an extremely unclear term as currently defined) must have a net worth of $10 million and insurance of $25 million. These numbers are too large and will preclude many companies from offering this service (thus restricting competition by establishing artificial barriers to entry). EWR Inc. is aware of *no justification* (research or studies) that supports such large numbers. It appears that these figures have been randomly selected.

Unless USDA has some strong justification (based on research or other factual evidence) for these figures then EWR Inc. favors *removing* them. Instead, the figures should be lowered to the level of the levels shown in 735.401(a). Alternatively, some maximum (not to exceed) amounts (these amounts should still be lower than the $10 million and $25 million) could be put in 735.402(a) and then actual (even lower) amounts should be included in the Provider Agreement where the figures can be modified as justified over time.

p. 46318, 735.402(b)(5) & (8) - Please refer to my comments regarding section 735.401(a)(5) & (8). Those comments are applicable here. EWR Inc. has not found any reference to an "integrity statement" in the Provider agreement for "other electronic documents"(Exhibit F). A "conflict of interest" statement does appear to be in Exhibit F under part I section C.

p. 46319, 735.404(b) - Providers need some flexibility to change their tariffs in less than a year if unforeseeable circumstances arise. The current proposed language provides no such flexibility. Since Providers to date have never increased fees, modifying fees tends to benefit users who normally receive reduced costs as a result of a fee change. Change the minimum time period for which the fees must be effective from one year to six months.

Exhibit C - Provider Agreement

p. 46337, Opening paragraph - The word "document" is not defined and is confusing. It is hard to differentiate between an "electronic USWA document" and an "other electronic document" (as referenced in the proposed regs 735.401 and 735.402). Some clarification is in order. Please refer to my comments regarding the definitions in the proposed regulations.

p. 46337, item C - This paragraph regarding "independence" is quite appropriate and seems to be in line with the intent of the regulations 735.401(b)(5) & (8). Without such language it could be assumed that some lack of independence is acceptable. The language as written helps and certainly does not cause any harm.

It must be noted that the current placement of the "independence" language is *not* in the "terms" section of the Provider Agreement. If this language is placed into the regulations as suggested then it automatically becomes incorporated into the "terms." This is the best alternative. If it is *not* placed in the regulations, then the "independence" language needs to be moved to or copied into the "terms" section of the Provider Agreement. Otherwise the language is useless because, in its current location, the statement is not a contractual condition with which the Provider must comply. Leaving it out of the "terms" section of the Agreement is equivalent to leaving it out of the Agreement completely.

p. 46337, II A - The statement "...not less than 12 hours on Saturday and Sunday..." is good because it recognizes that the systems are used sparingly on weekends except during the harvest season. The reduced weekend hours gives the Provider a little more downtime in which to perform system maintenance and upgrades. It would be nice if the 12 hours also applied to futures market-exchange holidays since there is minimal system activity on those days.

As a Provider, EWR will operate its system on weekends for 18 hours/day during busy times. Competition and our users will require this. However, during slow periods of the year it would be nice to have this option of not operating the system as many hours so that we can perform upgrades and maintenance.

p. 46337, II B 2 - The requirement not to report to FSA unless the system is down one hour is definitely an improvement over the current requirement of reporting if the system is down for 5 minutes.

p. 46337, II C - In the last sentence in this paragraph the language "...information from the Provider shall be available in either electronic or printed format..." needs to be changed. As written this could be interpretted to require the Provider to maintain extensive paperwork. This can be clarified by inserting the word "made" so that the revised sentence would state "...should be *made* available...." This requires the Provider to make paper documents for USDA upon demand but could not be interpreted as requiring the Provider to keep such paperwork on hand at all times.

p. 46337, IV - EWR Inc. would like to see the following wording added to this section:

Guaranty agreements from a parent company submitted on behalf of a subsidiary or from a related party may be accepted by the FSA in determining the net worth requirements of a Provider.

p. 46337, IV C - This paragraph is not in the current Provider Agreement. Instead, references to audits are in section 735.103 of the current regulations. Does this mean that a Provider has to do anything different from what we do now?

p. 46337, V - The word "strictly" in the first sentence is not appropriate and should be removed. This language is in the current Provider Agreement and the cotton industry argued in 1994 that "strictly" was not appropriate when the current version was developed. The problem with "strictly" is that it makes a system problem the Provider's fault regardless of whether it is the Provider's fault. If a meteor hits the Provider's computer and destroys it, should the Provider be held responsible for that meteor falling? This language ("strictly") says the answer is "yes" when clearly that would be unfair. The word "liable" alone carries adequate strength in this statement.

p. 46338., VI C - This paragraph does not reflect current business practice. Currently a holder may, through written notification, request that the Provider take action on his behalf. As recently as this week EWR delivered receipts for a holder who had circumstances which prevented him from doing this for himself. In this case, EWR received no fees. However, if EWR had not done the work the holder would have suffered major problems including probable financial losses.

The Provider must be allowed to act as the agent for the holder when such a request is in writing and signed. EWR Inc. would suggest that the proposed language be modified so that paragraph C would read in the

following manner:

> "*Providers shall not delete or alter any of the FSA required electronic warehouse receipt data fields, electronic USWA document data fields or related data in the CFS including the holder field unless such actions are authorized by this Agreement, by FSA, or by the holder in a written, signed document.*"

The suggested language in no way violates the proposed regulations.

p. 46338, VII A - The words "unauthorized distribution" are open for interpretation since there is no guidance given in any document as to what these words mean. Since no distribution is noted specifically as being "unauthorized" some Providers may choose to interpret this to mean that all distribution is okay until told otherwise. For example, this could become a problem if a Provider decides that some entity other than the receipt Holder is not "unauthorized" to review receipt data. To avoid this type of problem some clarification of "unauthorized distribution" needs to be made.

p. 46338, VII B - The new requirement that backup systems for Providers must be in a location different from the main computer is a good addition to this agreement.

p. 46338, IX A 1 a & b - When a warehouse specifies that it wants to change Providers, the current business practice (as mandated by USDA) is to move all open receipts from the old Provider to the new Provider. Yet this language states that only receipts/documents created within the past year should be moved to the new Provider. This makes no sense. It seems to state that, even though the warehouse has chosen a new Provider, the Provider Agreement will force the warehouse to maintain some receipts on the old Provider system. This would negate the warehouse's ability to make a choice. The words "*...within the past 1 year...*" need to be removed from both (a) and (b). Please refer to my comments in the paragraph that follows.

p. 46338, IX A 1 c 2 - This paragraph is unclear. If a warehouse is changing Providers then all open receipt records (i.e., every receipt that is not yet canceled) should be transferred to the new Provider. However, this paragraph says that the data to be transferred should *only* include open receipts issued in the past year. This would exclude all open receipts which are more than one year old. It makes no sense to transfer only some of the receipts and leave some on the old Provider system. This paragraph needs to be corrected by dropping the words "*within the past 1 year.*" Please refer to my comments for Exhibit C IX A 2 b.

p. 46338, IX A 1 c 4 - This paragraph needs to be broadened to specify which Provider's format the data has to be transferred. EWR Inc. has experienced problems in the past when other Providers have refused to accept data in our format or have refused to provide data in our format. Simply add language which states that the new Provider will provide the format for data transmission.

p. 46338, IX A 2 b - Please refer to my comments for IX A 1 c 2. Any open receipt or *open* document must be transferred to the new Provider. The language "*...issued within the past 1 year 30 days prior to the transfer date*" needs to be deleted. Perhaps I am misreading this entire sentence. I do not understand why the language seems to restrict those receipts which will be transferred to the new Provider. (Maybe there is a good reason that I am missing.) Many EWR Inc. warehouse customers hold open receipts which were originally issued several years ago. Refer to my other comments herein for section IX A of this proposed

Provider Agreement.

p. 46338, IX A 2 c - Some time frame needs to be included to indicate the deadline by which this must be done. The best idea would be to state that payment must be received before the transfer can occur.

p. 46339, XIII - The proposed regulations (735.401b5) states that the Provider Agreement will contain a conflict of interest statement. Such a statement is included in the terms in Exhibit F (Provider Agreement - Other Electronic Documents) in section I C. That language states *"(T)he Provider will operate a CFS in a manner that does not favor the interests of any party over those of another party or which creates the appearance of operation in a manner that us biased in favor of any other party."* That same language needs to be included in the Exhibit C provider agreement to be consistent and to meet the aforementioned regulatory requirements. Section XIII seems to be a "catch-all" section and is probably a good place to put this language unless it would be preferable to create an entirely new section.

p. 46339, Addendum 1: Fees - Since the fee is being raised substantially and we already are in the 2001-2002 crop year, EWR Inc. thinks it is only fair not to make this new amount effective until the next crop year.

Exhibit D - Addendum Cotton Electronic Receipts

p. 46339, I A - The paragraph states that the Provider will ensure that "...all of these fields are completed by all warehouse operators." One of the fields listed is Cancellation Date. It is impossible for the Provider to know when a receipt is going to be canceled since the warehouse makes that decision. This means it is impossible for the Provider to ensure that this field will be completed. Cancellation date needs to be dropped from this list.

A separate list should be created which shows required fields (for which a Provider must make space available in his electronic receipt record) other than those which the Provider must ensure are completed. Cancellation date would be first on this list. Tare weight also should be included along with Storage Paid Through Date and Crop Year.

p. 46340, I A - In the listing of fields:

1. Crop year should be included. The New York Board of Trade in 2003 will require this on certificated receipts. For regular receipts it can be misleading to the buyer if the correct crop year is not included.

2. What is the Bale Tag Number? Is this the number on a tag placed on the bale by the warehouse or the tag placed by the gin or either one? Change the name of this field to "Warehouse Bale Tag Number."

p. 46340, I A - Some statement should be included which allows the warehouse to alter/correct some of the listed fields even if the warehouse is not the holder. Any such change would have to be accompanied by notification of the change to the current holder. If desirable for security, it could be required that the warehouse notify (or request permission from) FSA prior to any change. Also, the eligible fields could be limited to: crop year; bale tag number; issuance date; received from; net weight; and storage paid date.

p. 46340, I B - The language states "FSA may allow a user....to modify the elements...." "May" is a somewhat nebulous term. How does the Provider know when "may" applies? Should we assume it is okay unless told to stop or do we need to obtain formal permission before allowing any change to occur? Will "may" be applied on a case-by-case basis or to everyone equally at the same time? This needs to be made a bit more specific.

p. 46340, I B - In the listing of fields:

1. EWR Inc. assumes the "warehouse code' is the code assigned by CCC. Is this correct?

2. "Rail and truck" may be applicable to some commodity but not to cotton. These should be eliminated from this list. Certainly there is no reason for this to be required information.

3. Not every warehouse uses the "location of the bale" field, although many do. As a Provider it does not bother EWR Inc. to leave this field in the list but we believe that making it required will prove to be a problem for many warehouses, especially the smaller "country" warehouses.

4. Gross weight needs to be eliminated from the list. Since net weight and tare weight are required fields, gross weight can easily be computed if it is needed. Requiring this redundant piece of data serves no useful purpose.

5. It is not necessary to require the collection of information regarding whether the warehouse has an agreement with CCC. This information adds nothing that is helpful in identifying the commodity represented or the negotiability of the receipt. This field should be excluded from the list.

Exhibit E - Addendum Grain Warehouse Receipts

EWR Inc.'s preceding comments regarding Exhibit D are all basically applicable also to Exhibit E.

Exhibit E-2 - Addendum Inspection & Weight Certificates

p. 46341, I B - The language states that "FSA may allow a user...to modify the elements listed below...." My question is whether it is appropriate for other users to be altering an official certificate at all. Perhaps this sentence should be dropped entirely.

Exhibit A - Licensing Agreement for Cotton

p. 46321, IV C 1 - This section is entitled "Records Kept In A Safe Place." Is it appropriate to use the language requiring the warehouse to maintain "...a current warehouse receipt book, copies of receipts issued, and canceled warehouse receipts...?" For a warehouse issuing an electronic receipt these things may not be necessary since the Provider maintains copies of receipts and an audit log showing all canceled receipts.

p. 46323, IV N 1 d - It is not common practice currently for the warehouse to give written notice to the Provider. Requiring written notice will slow down the correction process, create additional filing, and add to general chaos. There is nothing to be gained by doing this. This language should be stricken. Please refer to

my comments regarding 735.302(a)(6) in the proposed regulations. **Also, please note that this same comment is applicable to Exhibit B (Licensing Agreement for Grain).**

p. 46323, IV N 2 g - This language needs to be modified to reflect current business practice. The new wording would be:

Allows a 'holder' the option to authorize any other user of a provider system, or the provider itself, to act on their behalf with respect to their activities on the provider system.

Exhibit F - Provider Agreement Other Electronic Documents (p. 46342)
The opening paragraphs of this agreement attempt to define "electronic documents." Unfortunately, the definition is so broad that it is impossible to tell what documents are covered and which are not. This broad definition is obviously an attempt at flexibility which is laudable. Without an improved definition there is no way to know whether a document falls within the scope of this agreement. This is a major fault which has to be addressed.

As an example, consider a truck bill of lading. As I read Exhibits C and F, it appears to me that a truck bill of lading for 80 bales of cotton would fall under the definition of electronic document stated in Exhibit F. Yet the requirements for a Provider in Exhibit F are far in excess of those necessary for a Provider system maintaining a truck bill of lading. If the intent is for a truck bill of lading to be covered by the Exhibit C Provider Agreement (which is appropriate), that is not immediately clear by reading Exhibit C.

I C - The first sentence in this paragraph is very good and should be kept as is with no alteration.

I G - The $10 million figure appears to be unreasonable because there is no basis for it. It appears to be an amount that was arbitrarily chosen. Unless economic justification for $10 million can be made then the figure should be reduced perhaps to $500,000 (which I chose arbitrarily). In any case, there must be some reasoning to support these numbers and that must be based on sound economic arguments. The current figures are too large and appear to have been chosen randomly based on someone's individual whim.

I would like to see the following wording added to this section:

Guaranty agreements from a parent company submitted on behalf of a subsidiary or from a related party may be accepted by the FSA when determining the net worth requirements of a Provider.

I want to compliment the USDA staff on the good job they did in preparing these proposed rules. EWR Inc. appreciates USDA's consideration of its comments. Please call me if I can clarify any for you.

Sincerely,

Joseph T. Wyrick

Joseph T. Wyrick
President & CEO